

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

**CBeyond, Inc. PETITION FOR ) WC Docket No. 09-223**  
**EXPEDITED RULEMAKING )**

**REPLY COMMENTS OF THE**

**INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

To the Commission:

**I. INTRODUCTION**

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits these reply comments in response to the Petition for Expedited Rulemaking of Cbeyond, Inc.<sup>1</sup> ITTA is an alliance of mid-size telephone companies that collectively serve approximately 24 million access lines in 44 states, and offer subscribers a broad range of high-quality wireline and wireless voice, data, Internet, and video services.

In initial comments, ITTA opposed Cbeyond's request for a rulemaking proceeding to examine requiring incumbent LECs (ILECs) to provide unbundled access to the packetized bandwidth of hybrid loops, fiber to the home (FTTH) loops, and fiber to the curb (FTTC) loops at certain retail rates. In its petition, Cbeyond claimed that the Commission's reasoning was wrong when it found that fiber and hybrid loops should not be subject to mandatory unbundling. ITTA opposed the petition, demonstrating that the Commission's findings were justified and have fostered unprecedented investment, growth, innovation, and consumer benefits. The comments of other parties demonstrate that the Commission's prior decision was correct. ILECs have invested heavily in

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<sup>1</sup> *Petition of Cbeyond for Expedited Rulemaking and Request for Highly Confidential Treatment*, WC Docket No. 09-223 (Nov. 16, 2009) (Petition).

broadband deployment, face rigorous competition serving small and medium business customers, and would be subject to investment disincentives if unbundling requirements were imposed.

## II. DISCUSSION

In its petition, Cbeyond asked the Commission to compel ILECs to provide unbundled access to the packetized bandwidth of hybrid fiber-copper loops, FTTH loops, and FTTC loops at certain retail rates;<sup>2</sup> Cbeyond claimed that the lack of unbundling requirements had resulted in diminished investment, that competition is minimal, and that small and medium business customers are being ignored by incumbent providers.<sup>3</sup> ITTA disagreed, citing robust broadband investment by mid-size carriers and strong competitive markets. The filed comments of other parties support the ITTA position; individual carriers, including AT&T, Verizon, and Qwest, all point to aggressive investment strategies, as well as marketing efforts aimed at small and medium businesses. Moreover, those carriers and other entities describe vibrantly competitive markets. Finally, proponents of unbundling were generally unable to describe any justification for unbundling that transcended their own interests in obtaining low-cost access to infrastructure without their own capital investment and risk. For all of these reasons, the petition should be denied.

The Commission's prior decision to refrain from imposing the unbundling requirements has been successful. Those successes, specifically, massive investments by carriers in broadband networks, deflate any claims Cbeyond makes regarding the so-

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<sup>2</sup> Petition at 1.

<sup>3</sup> Petition at 5.

called “premature”<sup>4</sup> nature of the Commission’s decision to not require unbundling. Moreover, as described by several parties, the Commission’s decision has been reviewed and upheld upon judicial review;<sup>5</sup> Qwest aptly describes the petition as an “untimely petition for reconsideration.”<sup>6</sup>

In initial comments, ITTA described the investments that mid-size carriers, including ITTA members, have made expanding broadband services in their territories. These include FTTH and plans offering speeds up to 20 Mbps.<sup>7</sup> Other parties provided information demonstrating that Cbeyond’s allegation that investments have decreased is wrong. For example, AT&T described its own recent broadband investments of \$12 billion, as well as investments made by other entities, including: Clearwire, which received \$3.2 billion from various parties; cable industry, which has invested \$14.6 billion; and, a group of CLECs, which has collectively invested \$2 billion over two years.<sup>8</sup> These accomplishments evidence the correctness of the Commission’s decision to promote investment by not requiring ILECs to unbundle broadband “elements.” As the Commission noted, “[b]oth competitive LECs and incumbent LECs must obtain materials, hire the necessary labor force, and construct the fiber transmission facilities.”<sup>9</sup>

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<sup>4</sup> Petition at 5.

<sup>5</sup> *United States Telecom Association v. FCC*, 359 F.3d 554, 557-58 (D.C. Cir. 2004).

<sup>6</sup> Qwest at 2.

<sup>7</sup> See ITTA at 8.

<sup>8</sup> AT&T at 10.

<sup>9</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced*

Ultimately, ILECs and others, including some CLECs, assumed the risks and made the investments, while many CLECs did not. Their reluctance does not justify their requested access to those elements now.

The commitments by incumbents have borne impressive results: Corning, a manufacturer of fiber, explains that in 2003, 200,000 homes were FTTH passed, while in 2009, 17.2 million homes were FTTH homes passed.<sup>10</sup> Additionally, Corning notes that the percentage of wired plant dedicated to broadband grew from 30.2 percent to 52.3 percent;<sup>11</sup> Verizon alone committed \$23 billion since 2004.<sup>12</sup> Qwest notes that even if *total* dollar investment may have decreased in some instances, broadband-dedicated investment increased.<sup>13</sup> These data shatter the unfounded assertions set forth by the petition.

The investment patterns are buttressed by several studies cited by commenting parties. AT&T noted a report that concluded “countries that rely more on unbundled

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*Telecommunications Capability: Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, at para. 276 (2003). The Commission continued, “revenue opportunities associated with deploying any type of FTTH loop are greater than for services provided over copper loops. . . . the potential rewards for deploying overbuild FTTH loops are distinctly greater than those associated with deploying copper loops and thus present a different balance when weighed against the barriers to entry.”

<sup>10</sup> Corning 6, 7. Verizon cites similar data, illustrating that in 2003, 110,000 fiber lines were deployed in the United States; in 2008, that number grew to 2.3 million. Verizon at 10.

<sup>11</sup> Corning at 7, 8.

<sup>12</sup> Corning at 1.

<sup>13</sup> Qwest at 19, 20.

lines to provide broadband see less investment by incumbents in fiber than countries that rely less on unbundling lines and more on facilities-based entry.”<sup>14</sup> Verizon noted conclusions finding that “*none* of the major rationales for unbundling – such as promoting retail competition and enabling future facilities based competition – were supported by the empirical evidence.”<sup>15</sup> Simply, whether data demonstrating dollar investments, FTTH homes passed, or wired plant dedicated to broadband, broadband investment by ILECs and other carriers has increased impressively since the TRO, and claims that it has not are fundamentally incorrect.

Similarly incorrect are Cbeyond’s claims that ILECs are “ignoring” small and medium businesses. As explained in ITTA’s initial comments, Cbeyond’s petition is not a grounded legal justification, but rather an unproven (and actually specious) allegation that ILECs “neglect” small businesses.<sup>16</sup> That proposition is false. By way of example, Qwest describes numerous services it offers that are aimed at the small and medium business market,<sup>17</sup> and explains that cable operators and CLECs throughout its territory are also focusing on small and medium businesses.<sup>18</sup> Likewise, AT&T explains that

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<sup>14</sup> AT&T at 11, 12, *citing* Scott Wallsten and Stephanie Hausladen, *Net Neutrality, Unbundling, and Their Effects on International Investment in Next Generation Networks*, 8 Rev. Network Econ. 90 (Mar. 2009).

<sup>15</sup> Verizon at 23, *citing* Jerry Hausman and J. Gregory Sidak, *Did Mandatory Unbundling Achieve Its Purpose? Empirical Evidence from Five Countries*, 1(1) Journal of Competition Law & Economics 173, 245 (2005).

<sup>16</sup> Petition at 17.

<sup>17</sup> Qwest at 8-10, 14-15.

<sup>18</sup> Qwest at 11.

Comcast, a primary competitor, is targeting small and medium businesses,<sup>19</sup> and Verizon describes its offering of services to small and medium businesses, and the competition that it faces from cable operators.<sup>20</sup> In sum, allegations that investment has declined are false, arguments that the market is not competitive are not supported by fact, and claims that small and medium businesses are being ignored are unjustified.

As ITTA explained in its initial comments, Cbeyond seeks the benefits of costly, labor-intensive broadband deployments, but without any of the risk. AT&T observes that the petition is Cbeyond's "attempt to promote its narrow business model,"<sup>21</sup> noticing, as did ITTA,<sup>22</sup> that Cbeyond's complaints of expense are not sufficient to justify unbundling.<sup>23</sup> AT&T concludes that Cbeyond does not need more speed, it just wants more speed cheaper.<sup>24</sup>

The question of unbundling has been "asked and answered." The DC Circuit firmly upheld the Commission's right to "withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment."<sup>25</sup> The Commission's decision to forbear from requiring

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<sup>19</sup> AT&T at 18.

<sup>20</sup> Verizon at 11, 13.

<sup>21</sup> AT&T at 1.

<sup>22</sup> See, ITTA at 6.

<sup>23</sup> AT&T at 2.

<sup>24</sup> AT&T at 22.

<sup>25</sup> *United States Telecom Association v. FCC*, 359 F.3d 554, 557-58 (D.C. Cir. 2004).

unbundling of fiber loops was based on the recognition that mandatory unbundling would discourage investment in fiber loops. The imposition of unbundling requirements at this point would diminish incentives for ILECs to invest, and would eliminate incentives for CLECs, as well. Moreover, while Cbeyond and others invoke the current economic climate as reason to impose unbundling, unbundling would especially detrimental in the current economic climate. As noted by ITTA in its initial comments, proposals that carriers now, five years later, be forced to share that infrastructure raises the specter of a perhaps inadvertent, yet damaging, “bait and switch” regulation.<sup>26</sup> Others recognized this dismal result: AT&T notes that “carriers have invested heavily in fiber with the expectation that such facilities would not be subject to unbundling. . .,”<sup>27</sup> and Verizon noted that providers that endured the “full *risk* of their investments – relied upon the Commission’s unambiguous assertion that they would also be able to reap the full *rewards* of those investments without being forced to share advanced network elements with competitors.”<sup>28</sup> More critically, Verizon noted “serious Constitutional questions” implicated by such late-change regulation.<sup>29</sup>

Beyond the *post hoc* legal implications are the adverse impacts unbundling would have on investment. And, as Coming, a manufacture well-informed of market currents, warns, the mere opening of a rulemaking proceeding would inject damaging doubt and

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<sup>26</sup> ITTA at 10.

<sup>27</sup> AT&T at 1.

<sup>28</sup> Verizon at 25 (emphasis in original).

<sup>29</sup> Verizon at 26, citing *Duquense Light Co. v. Barasch*, 488 U.S. 299, 315 (1989).

uncertainty into the market.<sup>30</sup> ITTA submits that the ill-effects would be visited upon not only carriers seeking capital for deployment projects, but technology vendors, as well, whose wares would become less saleable in a market where incentives to purchase them would be decimated by ill-advised regulatory mandates.

### III. CONCLUSION

ILECs should not be subject to uneconomic unbundling obligations that fly in the face of the “impaired” requirement of the Communications Act. If beyond and similarly-situated entities seek fiber at market rates, that can be obtained through normative arm’s length negotiations with fiber owners. By contrast, the petition seeks an artificial price advantage over ILEC services, subsidized by ILEC investors. The Commission determined previously that it is in the public interest for ILECs to be able to invest in fiber facilities without a looming threat of that those facilities would be used to subsidize competitors. The Commission’s decision was upheld upon judicial review, and ILECs have invested rigorously. The Commission should refrain from disrupting that success and should, accordingly, reject the petition.

Respectfully submitted,



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<sup>30</sup> Corning at 2.